Mining Specialists, Inc. and its alter ego or successor Point Mining, Inc. *and* United Mine Workers of America, District 17. Case 9–CA–30680

September 24, 2001

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On February 9, 2001, Administrative Law Judge John H. West issued the attached supplemental decision in this compliance proceeding.[1] The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.

OVERVIEW

In the underlying unfair labor practice proceeding, we found, inter alia, that the Respondents violated Section 8(a)(5) and (1) of the Act by abrogating their collective-bargaining agreement with the Union[2] and by failing and refusing to bargain with the Union about the employees' terms and conditions of employment. Consequently, we ordered the Respondents to recognize and bargain with the Union, comply with the collective-bargaining agreement, and make the employees whole for any wages lost as a result of the Respondents' failure to comply with the terms of the collective-bargaining agreement.

The issues now before the Board in this compliance proceeding, as framed by the Respondents' exceptions to the judge's supplemental decision, are:

1. Whether Afton Willis has entirely forfeited his right to backpay by failing to look for substantially equivalent interim employment. We agree with the judge, as discussed below, that Willis has not entirely forfeited his right to backpay.[3]

2. Whether the Respondents are relieved of their backpay obligation to Chester Murphy on the asserted grounds that it would have been futile for them to offer him recall from layoff because he was incarcerated at the time that job openings in his classification first became available. We agree with the judge, as discussed below, that the Respondents have not established that it would have been futile to offer Murphy recall from layoff under these circumstances.

3. Whether the Respondents are required under the terms of our remedial order in the underlying unfair labor practice case to make the employees whole for unpaid production bonuses that were unilaterally discontinued by the Respondents. We agree with the judge, as discussed below, that the Respondents are required to make the employees whole for these unpaid bonuses.

DISCUSSION

1. Afton Willis

a. Period of nonentitlement to backpay

The compliance specification alleges that the backpay period for Willis begins on March 29, 1993, when he was not properly recalled from layoff by the Respondents, and ends on March 19, 1997, when he was recalled. The judge found that Willis is not entitled to backpay for the 4-month periods each winter, December through March, when he was on layoff from his interim employer, Class VI River Runners, Inc. (River Runners), and did not look for other interim employment. Specifically, the judge found that Willis is not entitled to backpay for March and December 1993, and January, February, March, and December 1994, 1995, and 1996. There are no exceptions to these findings, and we adopt them.

The compliance specification alleges that Willis was on layoff from River Runners from December 1, 1996, through February 14, 1997, when he was again recalled by that company. The record establishes that Willis did not look for other interim employment during this layoff period either. Although the judge found that Willis is not entitled to backpay for the first month of the layoff period (December 1996), he inadvertently failed to so find for the remainder of the layoff period (January 1 through February 14, 1997). This period is, of course, within the scope of the alleged March 29, 1993, to March 19, 1997 backpay period for Willis. We find under these circumstances, therefore, and consistent with this unchallenged aspect of the judge's decision, that Willis is also not entitled to backpay for January 1 through February 14, 1997.

[1] The Board's Decision and Order in the underlying unfair labor practice proceeding in this case is reported at 314 NLRB 268 (1994) (*Mining Specialists I*). The Board's initial Supplemental Decision and Order in this compliance proceeding is reported at 330 NLRB No. 17 (1999) (*Mining Specialists II*).

[2] The National Bituminous Coal Wage Agreement of 1988 (the collective-bargaining agreement, or the 1988 Wage Agreement).

[3] There are, however, no exceptions to the judge's finding, discussed infra, that Willis *has* forfeited his entitlement to backpay for 4-month periods each winter when he was on layoff from his interim employer and did not look for other interim employment.

In the compliance specification, the amounts owed to Willis are calculated in sequential calendar year quarters (i.e., 1993–1, 1993–2, 1993–3, etc., through 1997–1). Although the January through March periods for which Willis is not entitled to backpay correspond to full calendar year quarters, the December periods and the January 1 through February 14, 1997 period obviously do not. Consequently, we shall remand to the Regional Director the part of this proceeding pertaining to Willis for the purpose of recalculating the amounts owed to him.

b. Period of entitlement to backpay

We also agree with the judge, however, for the reasons he sets forth, that the Respondents have failed to establish that Willis entirely forfeited his entitlement to backpay by failing to make reasonable efforts to secure substantially equivalent interim employment after being laid off as a roof bolter in April 1991 and prior to obtaining interim employment as an equipment truck-driver/mechanic with River Runners later that year or in 1992.[4]

Willis was not questioned and did not testify about his job search activity *prior* to being hired by River Runners. He was questioned and testified only about his job search activity *after* being hired by River Runners, during the periods of his annual winter layoffs from that employment. Consequently, we agree with the judge, for the reasons he sets forth, that the Respondents have not satisfied their burden to establish that Willis failed to make reasonable efforts to secure substantially equivalent interim employment prior to being hired by River Runners. See *Black Magic Resources*, 317 NLRB 721 (1995) (burden is on the employer to show the facts necessary to establish that a discriminatee neglected to make reasonable efforts to find interim work).

We find *EDP Medical Computer Systems*,[5] relied on by the Respondents, to be inapposite. There, the record established that after the discriminatee, a collections agent, was unlawfully discharged, he did not look for interim work as a collections agent or for any related office clerical work. Instead, he sought interim employment *only* as a postage machine operator obtaining a job with the postal service as a casual employee for 1 month during the Christmas season. The Board found that by confining his employment search to only postage machine operator jobs, the discriminatee failed to make an adequate search for employment. His claim for backpay was therefore denied. Here, on the other hand, there is no evidence that Willis confined his search for interim employment in any manner *before* obtaining interim employment with River Runners. Consequently, we agree with the judge that Willis has not entirely forfeited his right to backpay on those grounds.

2. Chester Murphy

Murphy was a roof bolter at the time of his layoff on April 15, 1991. Article XVII, seniority, of the applicable collective-bargaining agreement, pertaining to procedures for recall from layoff, provides in pertinent part as follows:

> Section (d) *Panels*
>
> Employees who are idle because of a reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority.
>
> . . . .
>
> Section (e) *Panel Custodians*
>
> Notice to the last known address of the laid-off Employee by certified mail shall be sufficient notice of recall . . . . [I]f the Employee . . . fails to respond within four calendar days after receipt of such notice or accepts [the job offer] but fails to report for work in a reasonable time his name shall be removed from the panel at that mine and he shall sacrifice his seniority rights at that mine.

Murphy completed the contractually required panel registration form and submitted it to the Respondents on April 16, 1991. He was incarcerated from February 1992 through May 11, 1993.[6] Around May 14, he asked the Respondents' president, Roy Lucas, if Lucas was doing any hiring or if he was going to recall any laid-off employees. Lucas replied no, that business was slow and he did not have any work available at that time. On August 10, however, the Respondents hired Danny Dalser as a roof bolter; he had not previously worked for the Respondents. The Respondents did not recall Murphy to employment until March 10, 1997. The compliance specification, as amended in pertinent part at the hearing, alleges that the backpay period for Murphy begins on August 10, 1993, when he was not properly recalled from layoff by the Respondents, and ends on March 10, 1997, when he was recalled.

The Respondents acknowledge that Murphy was first eligible for recall from layoff on March 29, when the Respondents filled positions in Murphy's roof bolter classification. But the Respondents did not offer him

[4] The judge stated, without elaboration, that Willis was hired by River Runners in 1992. Although Willis testified that he has driven the equipment truck for River Runners since 1992, he also testified, without elaboration or contradiction, that he started working for River Runners in 1991.

[5] 302 NLRB 54 (1991), enfd. mem. 959 F.2d 1101 (D.C. Cir. 1992).

[6] All dates in this section are 1993 unless otherwise stated.

recall at that time, assertedly because he was still incarcerated. They argue that they did not have to undergo the "futile process" of sending Murphy a certified letter to notify him of his recall rights in late March, because they knew that he was incarcerated and "could not accept or report for the vacant position." They contend that Murphy either would not have responded to a late March notice of recall, would have had to reject such a recall offer, or in any event would not have been able to report for work in a reasonable time after such a recall offer, as required by the contract. Therefore, the Respondents assert that their obligation to recall Murphy ended in late March 1993, approximately 4 months prior to the beginning of the backpay period.

Like the judge, we find these arguments to be without merit. The Respondents have not established that Murphy would not have received a recall offer sent to his last known address and forwarded to him in confinement, or that he would not have responded to such an offer. Nor have they established that he would not have been able to *accept* such an offer and report to work within a reasonable period of time. In this connection, it is significant that "reasonable time" is not further defined or limited in the contract, and the Respondents have presented no extrinsic evidence bearing on the meaning of the phrase, such as the parties' past practice or an arbitration award. On this bare record, we cannot say that it would have been "unreasonable" for Murphy to accept an offer of recall in late March and seek a reporting date approximately 6 weeks later, in mid-May, after his release from confinement. Indeed, an offer of employment from the Respondents conceivably could have served as the basis for an acceleration of Murphy's upcoming release date.[7] Accordingly, for these reasons, we reject the Respondents' "futility" defense, and we adopt the judge's finding that the Respondents were obligated to recall Murphy on August 10 when they filled a position in his job classification.

3. Production bonuses

Article XXII, miscellaneous, section (s), *bonus plans*, of the collective-bargaining agreement contains formal procedures under which the Respondents and the unit employees can agree on the establishment, revision, or termination of bonus plans (which are not further defined in the contract).[8]

In April 1994, the Respondents unilaterally established a production bonus plan. They unilaterally modified it about a month later, and they unilaterally discontinued it in January 1995, approximately 6 months after the issuance of *Mining Specialists I*.[9] They did not follow any of the procedures contained in the collective-bargaining agreement for establishing, modifying, or terminating a bonus plan. Indeed, the Respondents contend that *because* they did not follow the contractually mandated procedures in *establishing* the bonus plan they unilaterally *discontinued* it in January 1995 in accordance with the Board's remedial order requiring the Respondents to comply with the terms of the collective-bargaining agreement.

We agree with the judge, for the reasons he sets forth, that because the Respondents failed to apply the contractual procedures in establishing the production bonus plan in question the plan became an extra-contractual term and condition of employment and a mandatory subject of bargaining. Consequently, under the terms of our remedial order, the Respondents were obligated to bargain with the Union before modifying or terminating that term and condition of employment.[10] They did not do so. Accordingly, we agree with the judge that the Respondents are required under the terms of our remedial order to make the employees whole for their losses incurred as a result of the Respondents' unilateral discontinuation of the production bonuses, as set forth in General Counsel's Exhibit 7 in the compliance hearing.[11]

ORDER

The National Labor Relations Board orders that the Respondents, Mining Specialists, Inc. and Point Mining,

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[7] *Auburn Foundry*, 284 NLRB 242, 245 (1987) (if employer had made offer of reinstatement to discriminatee who had 5-1/2 months remaining on jail sentence, authorities incarcerating discriminatee may have worked out some reasonable accommodation with employer for discriminatee's early release).

[8] Subsecs. (2)(B) and (C) of art. XXII, sec. (s), do state, respectively, that: "[t]he plan shall provide an earnings opportunity above the standard daily wage rate for all active classified Employees at the mine" and "[c]ompensation provided under the plan shall only be monetary."

[9] The particulars of this plan are set forth in sec. F of *Mining Specialists II*, 331 NLRB No. 17, slip op. at 7–8. Initially, the bonus plan paid each employee $500 for each month in which the Respondents produced at least 100,000 tons of raw coal. Subsequently, the Respondents unilaterally modified the plan to pay each employee $500 for each month in which the Respondents produced at least *50,000* tons of *clean* coal.

[10] See, e.g., *Ohio Power Co.*, 317 NLRB 135 (1995) (obligation to bargain about termination of extra-contractual practice of allowing workmen's compensation officers time off without pay to attend workmen's compensation hearings); *Dearborn Country Club*, 298 NLRB 915 (1990) (obligation to bargain about discontinuance of extra-contractual practice of offering overtime to full-time servers before offering it to others); *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987) (obligation to bargain about modification to extra-contractual employee purchase plan); *Radio Electric Service Co.*, 278 NLRB 531 (1986), enfd. mem. 826 F.2d 1056 (3d Cir. 1987) (obligation to bargain about discontinuance of extra-contractual Christmas bonus).

[11] The General Counsel and the Respondents stipulated at the hearing that if the Respondents are found to owe these production bonuses, then the amounts they owe are set out in GC Exh. 7.

Inc., both of Belle, West Virginia, jointly and severally, their officers, agents, successors, and assigns, shall make whole the following individuals and the United Mine Workers of America 1974 Pension Trust Fund, by paying them the amounts following their names, with interest on the backpay owed the individuals to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings on the backpay due the individuals as required by Federal and State laws, and any additional amounts accruing on the Pension Trust Fund contributions as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Danny Balser	$4958.93
James Balser	4406.63
Edward Bragg	5631.78
Dale Butcher	00.00
Kenneth Davis	6505.96
Kenneth Davis	249.25
	(medical expenses)
David Deweese	3639.56
Roger Deweese	5637.66
Thomas Dunlap	00.00
Kenneth Fannin	3708.31
Warren Farmer	6313.86
Harry Fortner	3729.12
Clayton Gibson	5692.36
Ira Gunnoe	5610.81
Opie Hanshew	6147.83
David Hughes	6863.82
Wilson Jefferson	00.00
Kerry Kelley	7089.74
Stewart Kennedy	6802.37
Wayne Kincaid	4955.76
Wayne Kincaid	3047.64
	(medical expenses)
William Kinder	3107.60
Ronald Lucas	6596.46
David Mallory	500.00
Mickey McClure	500.00
Edgar Morris	5379.66
Ronnie Mullins	00.00
Chester Murphy	81660.11
Chester Murphy	1230.50
	(medical expenses)
Charles Nunley	5189.50
Roy Pauley	7112.69
Ricky Ratliff	6120.75
Roy Ratliff	3327.43
William Samples	5239.93
Russell Shearer	4876.65
Bernard Smith	5455.76
Bryon Smith	5397.92
Wesley Smith	5493.25
Daniel Taylor	2056.11
Farrel Taylor	3209.47
Benjamin Tucker	5350.58
John Vandal	500.00
Delmos Weese	2298.40
John Zakas	500.00
Joseph Zakas	5436.23
TOTAL BACKPAY	$253,003.00
TOTAL MEDICAL EXPENSES	4,527.39
TOTAL PENSION TRUST FUND CONTRIBUTIONS	184,345.28
	(includes $5336.17 for Murphy)

GRAND TOTAL AMOUNTS DUE $441,875.67

IT IS FURTHER ORDERED that the part of this proceeding pertaining to Afton Willis is remanded to the Regional Director for Region 9 for the purpose of recalculating the amounts owed to Willis for the following months or part thereof, as specified:

1993	1994	1995	1996	1997
March	January	January	January	January
December	February	February	February	February 1-14
	March	March	March	
	December	December	December	

Dated, Washington, D.C. September 24, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

David L. Ness, Esq. for the General Counsel.
Erin M. Condaras, Esq. (Jackson & Kelly), of Charleston, West Virginia, for the Respondents.
Mr. Robert Phalan, of Charleston, West Virginia, for the Charging Party.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge. On July 8, 1994, the National Labor Relations Board (Board) issued its Decision and Order in this proceeding[1] directing Respondent Mining Specialists, Inc. and its alter ego or successor Point Mining, Inc. to, among other things, (a) comply with the terms and con-

[1] *Mining Specialists, Inc.*, 314 NLRB 268.

ditions of the National Bituminous Coal Wage Agreement of 1988 (Agreement) between the Union and the Respondent Mining Specialists, Inc. retroactive to January 26, 1993, and prospectively until such time as proper and timely notice of cancellation is given, in the manner set forth in the Agreement; (b) make whole the unit employees [2] by transmitting the contributions owed to the Union's health and welfare, pension, and other funds pursuant to the terms of the Agreement, and reimburse unit employees for medical, dental, or any other expenses ensuing from its unlawful failure to make the required contributions; and (c) make whole the unit employees for any wages lost as a result of the Respondents' failure to comply with the terms of the Agreement. The Regional Director for Region 9 issued a compliance specification and notice of hearing alleging, as here pertinent, that the Respondents owed certain amounts of: (a) contributions to benefit and pension funds; (b) calendar quarter gross backpay, benefits, and fund payments for employees who were not properly recalled from layoffs in accordance with the terms of the Agreement; and (c) overtime, holiday, vacation, and bonus pay. The Respondents filed an answer to the specification, admitting in part and denying in part the allegations in the specification, and raising four affirmative defenses.[3]

On January 19, 1999, the General Counsel filed with the Board a Motion for Partial Summary Judgment and to Strike Portions of the Respondents' answer, including the affirmative defenses, and a memorandum in support of the motion. On January 22, 1999, the Board issued an Order Transferring Proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On February 5, 1999, the Respondents filed a memorandum in opposition to the motion.

On November 26, 1999, the Board issued a Supplemental Decision and Order in which it granted the General Counsel's Motion for Partial Summary Judgment as to certain of the allegations contained in the compliance specification, and it denied the motion as to certain other of the allegations contained in the compliance specification.[4] The Board further ordered that this proceeding be remanded to the Regional Director for Region 9 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, for the taking of evidence concerning factual issues properly raised by the Respondent's answer to the compliance specification.

A trial was held in this backpay proceeding on May 2, 2000, at Charleston, West Virginia. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondents,[5] I make the following findings of fact and conclusions of law:

At the trial, the General Counsel orally amended the allegation in the compliance specification regarding the total payments owed the 1974 Pension Trust, which is calculated by determining the hours worked by the unit employees during the backpay period. The General Counsel admitted that the amounts owed are reflected in the hours worked shown in Respondents' appendix 1 to their answer to the compliance specification, with some of the totals corrected by the General Counsel. Also, the Respondents orally agreed that an additional 305.75 hours worked should be credited for Thomas Dunlap for 1993. As pointed out by the General Counsel on brief, it is undisputed that the total hours worked for computing the total payments owed the 1974 Pension Trust is $251,054, and the total payments due would be $179,009, with interest.

At the trial the Respondents orally agreed that they owe certain medical expense payments. As pointed out by the General Counsel on brief, it is undisputed that the total medical expenses payments due the unit employees in paragraphs 3 and 9(b) (and appendix B) of the compliance specification is $3296, with interest.

The Respondents orally agreed at the trial that the amounts they owe unit employees for their failure to pay them overtime in accordance with the Agreement are set forth in the General Counsel's Exhibit 5. As pointed out by the General Counsel on brief, the total amount of overtime pay owed unit employees under the agreed-upon recalculation for paragraphs 5 and 9(d) of the compliance specification is $9596, with interest.

At the trial, the Respondents orally agreed that the correct amounts due unit employees for the holidays in 1994 are reflected, as here pertinent, in the General Counsel's Exhibit 6. The General Counsel on brief indicates that the total amount due unit employees for holiday pay is $72,412.

As a result of the above-described stipulations, only two issues remain. The first is whether the Respondents failed to properly recall unit employees Chester Murphy, Afton Willis, and Anthony DeMarco pursuant to the agreement. The second is whether the Respondents failed to provide unit employees with bonuses in accordance with the Agreement. The Respondents stipulated that in the event that they do owe bonuses, the

[2] The unit is described in the agreement. 314 NLRB at 273 (Conclusion of Law 3).

[3] The third affirmative defense was subsequently withdrawn. The remaining affirmative defenses were all rejected by the Board in its Supplemental Decision and Order described below.

[4] *Mining Specialists, Inc.*, 330 NLRB No. 17. More specifically, the Board (a) granted the motion with respect to the allegations contained in pars. 2(c), 4(i), 5(a), 6, and 7, appendixes F and G, p. 1 of appendix E, and the gross backpay, bonus, and holiday pay, and Pension Trust contributions for the five individuals in specification appendix C of the compliance specification, and (b) denied the motion as to pars. 2(d), 5(c), and 8, and appendixes A, D, and page 2 of appendix E.

[5] The General Counsel filed a motion to strike the Respondents' brief contending that the time for filing briefs was June 13, 2000; that Respondents' brief is postmarked June 13, 2000; and that under Sec. 102.111(b) of the Board's Rules and Regulations documents which are postmarked on or after the due date are untimely. The Respondents filed a memorandum in opposition and a motion to file the Respondents' posthearing brief out of time. Under Sec. 102.111(c) "briefs may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result. A party seeking to file such . . . briefs beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts." The Respondents have met the requirements of Sec. 102.111(c). Accordingly, the Respondents' motion is granted. The General Counsel's motion is denied.

amount alleged in the General Counsel's Exhibit 7 is the correct amount.

Pursuant to the involved agreement, laid-off employees who fill out a panel form and turn it in to mine management within 5 days after being notified that they are being laid off are placed on a panel from which they are recalled on the basis of seniority (as described in the Agreement).

Willis worked for Mining Specialists, Inc. at the Witcher Creek Mine from January 1990 until April 1991. His last job classification was roof bolter, which position is covered under the Agreement. In April 1991 Roy Lucas, who is the president of Mining Specialists, Inc., said that he was going to lay off the evening shift, which Willis was on along with about seven other employees. Willis sponsored the General Counsel's Exhibit 8, which is a letter to him from Lucas dated April 12, 1991, in which Lucas memorializes the layoff. Willis testified that the last day of work was on April 14 and he filled out a panel form on April 16 or 17, 1991; that he filled out the panel form in the office at Mining Specialists, Inc. at the mine site; that he, Murphy, Lucas, and Eddie Bragg, who was an employee of Mining Specialists, Inc. and a union representative, were in the office at the time; that he and Lucas signed the panel form and Bragg also signed it as a witness; that Lucas took a copy of the form, he took a copy of the form, Bragg took a copy of the form and he "got a copy to the Union"; that a week before the trial on the specification he looked for his copy of the form but he could not find it; and that Lucas did not offer him employment again until February 21, 1997. Willis went to work for Point Mining, Inc. at Campbell Creek in mid-March 1997, stayed 6 days, and left the job when he found out that Lucas was not paying into any union retirement funds.

On cross-examination Willis testified that at the time of the trial he worked for Class 6 River Runners (River Runners), which is a rafting company; that he drove an equipment truck and does some mechanical work for River Runners since he was hired by them in 1992; that until 1997 he was a seasonal employee with River Runners, that he returned to River Runners after working for Point Mining, Inc. for 6 days in 1997; that he got full medical coverage from River Runners when he became full time in 1997; that he did not renew his certified underground miner papers after he was laid off in 1991;[6] that when he was laid off by River Runners during the off-season he did not look for work; that after he started with River Runners he did not look for other work;[7] that no one, other than Point Mining, Inc., has offered him a job since 1993; and that he obtained the panel form which he gave Lucas, from the union representative.

On redirect, Willis testified that he did not look for work in the off-seasons while he worked at River Runners because he was not actually on layoff but rather it was understood that he would return to work with River Runners when the season started; that River Runners gave him a low earnings slip[8] which he took to the unemployment office every 2 weeks to draw an unemployment check; and that he received low earnings slips from 1991 to 1997 when he became a full-time employee with River Runners.

When called by the General Counsel, Roy Lucas, who is the president of Mining Specialists, Inc. and Point Mining, Inc., testified that Point Mining, Inc. began operating at Campbell's Creek about January 24, 1993, and it ceased operations at this site on October 14, 1998; that he laid off Murphy, Willis, and DeMarco in mid-April 1991; that Murphy and Willis were roof bolters and Demarco was an electrician; that these two job classifications were covered under the Agreement; that he was positive that Murphy, Willis, and DeMarco did not give him panel forms when they were laid off in mid-April 1991; that it is his signature on The General Counsel's Exhibit 11, which is a "**BCOA-UMWA STANDARDIZED PANEL FORM**" for Murphy dated April 16, 1991, signed by Murphy and Bragg, listing the employer as Mining Specialists, Inc.; that he did not remember this panel form; that Bragg was an employee of his at the time but he did not have knowledge of Bragg being a union representative; that he operated Point Mining, Inc. as nonunion from January 1993 until January 1995; that when he first started operating at Campbell's Creek he hired some employees who had worked for Mining Specialists, Inc. at Witcher Creek; that subsequently he hired more people for Campbell's Creek but he did not hire off a panel since there was no panel because he was operating nonunion; that when he subsequently hired he hired some people who had not worked for Mining Specialists, Inc.; that Danny Dalser, who had not worked previously for Mining Specialists, Inc., was hired by Point Mining, Inc. at Campbell's Creek in August 1993 as a roof bolter; that Roger Dewise, who did not previously work for Mining Specialists, Inc., was hired by Point Mining, Inc. at Campbell's Creek as a scoop operator and not an electrician; that in April 1994 he verbally advised the employees that he would give them a bonus if they mined 100,000 raw tons of coal a month; that he did not document the bonus and he did not notify the Union regarding the bonus because he was operating nonunion at the time; that he did not provide anyone with a written description of the bonus; that when he ceased giving the bonus he did not notify the Union; and that on January 3, 1995, he posted the Board's Order and advised the employees that he was going to abide by the Board's ruling, and he was going to eliminate the bonus plan because it was not set up according to the Agreement.

In response to questions asked by the Respondents' attorney, Lucas testified that as the rejected portion of the tonnage increased, he told the employees that he reduced the bonus, about 1 month after the plan started, to 50,000 tons of "clean" coal since sometimes 60 percent of the tonnage was reject and he was only paid for clean coal; and that he did not recall Murphy at the time he would have been eligible for recall and a job came available because Murphy was in jail.

[6] When he went to work for Point Mining, Inc. in 1997 he had an underground coal mining position after he took an 8-hour retraining course at Point Mining, Inc.

[7] Generally Willis went to work for River Runners around the first of April and he was laid off around the first of December. During this period Willis did not work at all and he did not search for jobs.

[8] According to the testimony of Willis, the slip is different from the regular unemployment slip because it does not have the part, which has to be filled out indicating a job search.

On redirect Lucas testified that he made no attempt to offer Murphy a job before 1997, and that he did not know that Murphy got out of jail about May 11, 1993; and that he did not try to get in touch with Murphy until shortly before he was hired in 1997 by Point Mining, Inc.

On recross-examine Lucas testified that Murphy never contacted him about the fact that he had been released and was available to work; that laid-off employees are "obligated" to update the panel form on a yearly basis,[9] and that Murphy, Willis, and DeMarco did not contact him about updating the information on the panel forms (which Lucas allegedly did not recall receiving in the first place).

Murphy testified that he worked for Mining Specialists, Inc. from February 1990 until April 1991 as a roof bolter; that in April 1991 he filled out a panel form the day after he was laid off; that he filled out the panel form in the office of Mining Specialists, Inc. in the presence of Lucas, Willis, Bragg, and Ed Farmer; that he and Willis filled out the panel forms and then Lucas signed them and Bragg signed as witness, the General Counsel's Exhibit 11; that he kept a copy of the panel form, Lucas took a copy and Bragg took a copy to mail to the Union; that his signature on the panel form is dated April 16, 1991; that he was incarcerated from February 1992 until May 11, 1993, for vehicular homicide or a "DUI accident causing death"; that about three days after he was released from jail he saw Lucas and he asked Lucas if he was doing any hiring or if he was going to call any employees back; that Lucas said no he was kind of slow; that he went to work with Point Mining, Inc. in March 1997; and that this was the first time that Point Mining, Inc. offered him a job.

DeMarco testified that he worked for Mining Specialists, Inc. at Witcher Creek from March 1990 to April 15, 1991, as a certified electrician; that he has never been offered employment by Point Mining, Inc.; that he and his wife have had legal custody of their granddaughter since September 1991; that after he was laid off by Mining Specialists, Inc. he worked for MAG, which is a coal mine, from August 1991 until December 1995, and he had health insurance after the first 90 days; that he then worked for HOWTA Mining for 2 months, without health insurance, until about May 1996; that he was hired by Performance Coal in August 1996, he had health insurance coverage, and he was working there when he testified at the trial herein; that his drive 3 days a week to MAG involved 30 miles a day more than a drive between his house and the involved Campbell's Creek mine; and that 5 days a week he drove 52 miles further (each way) between his house (before he moved in April 1998) and Performance Coal's mine site than he would have had to drive to Campbell's Creek.

On cross-examination Demarco testified that he broke his hip and pelvis on the job while working for MAG and he was off work for 9 weeks; that in 1995 he suffered a heart attack and was off from work for 13 weeks; that between December 1995 and March 1996 he looked for work and the Unemployment office would have a record of his job contacts; and that between the time he worked for HOWTA and Performance Coal he looked for a job and he had two other offers at about the time he went to work for Performance Coal.

Robert Phalan, who is the president of District 17, testified that in the involved district of West Virginia there is a certification procedure to work in a coal mine; that once an individual passes the miner's certification test and receives a miner's certificate, the only thing that individual would have to do is take an 8-hour retraining course once a year, or, if the individual was recalled from a layoff as a roof bolter, the individual would only be required to take an 8-hour retraining course before the individual went back to work.

Contentions

On brief the General Counsel contends that the Respondents did not comply with the panel obligations under the agreement; that the Respondents' failure to honor the panel rights of Murphy, Willis, and DeMarco constitutes noncompliance with the Board Order; that the Respondents' denial, Lucas' testimony, that Murphy, Willis and DeMarco submitted panel forms following their April 1991 layoff is demonstrably not true; that Murphy produced a copy of the panel form and he corroborated Willis' testimony about the latter's panel form; that "DeMarco testified at the hearing but counsel for Respondent did not inquire with him as to whether he completed the panel form" (GC br. 9); that the Respondents did not consider panel obligations because the Respondents were operating nonunion at Campbell's Creek; that Murphy maintained his panel rights while incarcerated and although he told Lucas on about May 14, 1993, that he was available, Lucas continued to hire employees without going through the panel; that Willis understood that he was not required to search for work while receiving low-earnings slips from the unemployment benefit office, and no other company offered Willis employment during the backpay period; that in the context of an overall search effort, the Board has found that a "brief" period. (Here, the 'brief' period was one third of the year.) during which a claimant undertook no activities to seek employment did not constitute failure to mitigate, *Retail Delivery Systems*, 292 NLRB 121, 125 (1988); that it was not unreasonable for Willis to not seek other employment during off-season months because he had every reason to believe that he would be recalled during the rafting season; that the Respondents have failed to offer any evidence that there were any available mining or related jobs in the area that Willis could have filled, *Black Magic Resources*, 317 NLRB 721 (1995); that the agreement permits a signatory employer to implement a bonus plan under certain conditions; that Lucas admitted that he did not comply with the conditions: that the bonus plan became a term and condition of employment and therefore the Respondents were obligated to provide the Union with prior notice and an opportunity to bargain before discontinuing the bonus; that Lucas did not even give the employees the required 30 days' notice of termination of the bonus, and when he spoke to the employees the termination was a fait accompli; that the Board has already concluded that if it is determined that the Respondents are liable for bonus pay, then they are liable for the amount specified in the compliance specification; and that the Board has found that to the extent that an

[9] Sec. (d) of art. XVII of the agreement, GC Exh. 10, reads in part as follows: "[e]ach panel member **may** revise his panel form once a year." (Emphasis added.)

employer's unlawful failure to apply the terms of a collective-bargaining agreement may have led to improved terms and conditions of employment for unit employees, the Board's remedial order shall not be construed as requiring or permitting the employer to rescind any such improvements unless requested to do so by the union, *ABF Freight System*, 325 NLRB 546, 547 (1998).

The Respondents, on brief, argue that Point Mining, Inc. is not liable for bonus pay; that Point Mining, Inc. did not install a bonus plan in accordance with the terms of the Agreement; that because the Agreement provides that no bonus plan can be installed unless and until the outlined process is followed, no bonus plan was in place at Point Mining, Inc. at any time; that, therefore, because the terms and conditions of the Agreement do not provide a basis for bonus pay, the claim for backpay in the form of bonus pay fails; that Point Mining, Inc. terminated any bonus plan in January 1995 in accordance with the terms of the Agreement; that the General Counsel did not introduce any evidence that the Union requested bargaining over the elimination of the alleged plan or any evidence that Point Mining, Inc. did not bargain over the termination of the alleged plan; that DeMarco is not entitled to backpay because he was not eligible for recall in that he did not complete and submit a panel form at the time of his layoff; that Point Mining, Inc. has no record of a panel form for DeMarco, Lucas did not recall that DeMarco submitted one, and the General Counsel did not present any evidence that DeMarco completed and submitted a panel form after his April 1991 layoff from Mining Specialists, Inc. or at any time; that Point Mining, Inc. did not have to send a notice of recall to Murphy in March 1993 because the act would have been futile since Murphy was in jail; that Point Mining, Inc. had the right to remove Murphy's name from the panel[10] and it had no obligation to recall Murphy after March 1993; that Willis is not entitled to backpay because he failed to mitigate his damages and "[i]t is well settled that to be entitled to backpay a discriminatee must make reasonable efforts to secure interim employment which is substantially equivalent to the position from which he was discharged," *EDP Medical Computer Systems*, 302 NLRB 54 (1991); that Willis completely failed to mitigate his damages for the annual 4-month periods in which he was laid off; and that because he willfully removed himself from the work force during those periods and sought no employment, Willis is not entitled to backpay during those periods.

Analysis

Notwithstanding Lucas' testimony to the contrary, the General Counsel has demonstrated that Murphy and Willis did comply with the requirements of the Agreement with respect to panel forms. The testimony of Murphy and Willis is credited. The testimony of Lucas that he did not remember Murphy and Willis submitting panel forms is not credited. As noted above, a copy of Murphy's panel form with Lucas' admitted signature on it was received in evidence. This along with the corroborating testimony of Murphy and Willis about their panel forms contradicts the "do not remember" testimony of Lucas regarding the panel forms of Murphy and Willis.

On the other hand, there is no evidence to contradict Lucas' testimony with respect to whether DeMarco complied with the Agreement's requirement regarding panel forms. DeMarco testified but he did not even assert that he filled out and submitted a panel form to Lucas when he was laid off in April 1991. Neither Murphy nor Willis testified that DeMarco was with them when they filled out the panel forms and gave a copy to Lucas on April 16, 1991. In other words, there is not even a scintilla of evidence that DeMarco complied with the requirement of the Agreement with respect to a panel form. In these circumstances, Lucas' testimony is uncontroverted with respect to whether DeMarco filed a panel form. That being the case, the testimony of Lucas is credited regarding DeMarco not submitting a panel form. To one who might be concerned ostensibly with the fact that Lucas' testimony is not being credited with respect to the panel forms of Murphy and Willis but it is credited with respect to DeMarco's failure to timely submit a panel form, as pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950):

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

Again, Lucas' testimony about whether DeMarco submitted a panel form in uncontroverted. Since it has not been shown that DeMarco submitted a timely panel form to Mining Specialists, Inc., the Respondents did not have any obligation to DeMarco under the Agreement.

Obviously, finding that Murphy and Willis did submit timely panel forms does not end the matter with respect to them. As noted above, Murphy was incarcerated for a period of time. On the one hand, the Respondents concede that the Point Mining, Inc. operation was not a union operation and, therefore, there was no utilization of a panel. On the other hand, the Respondents argue about the futility of contacting Murphy when he was incarcerated, and the justification for removing Murphy from a panel because of his incarceration. We should not be dealing with post hoc rationalizations or an attorney's spin on what occurred. We should be dealing with the facts as they occurred. Fact one is that Lucas did not use a panel for Point Mining, Inc. Lucas never had any intent in 1993 to contact those who had submitted panel forms. Indeed, Lucas did not contact Willis who did file a panel form and was available in 1993. That being the case, Lucas would not have had any reason to take Murphy off a panel which Lucas still denies even existed with respect to Murphy and Willis. Fact two is that Murphy, about May 14, 1993, saw Lucas and asked him for a job. Murphy's very specific testimony on this point is credited. The testimony of Lucas that he did not know that Murphy got out of jail about May 11, 1993, and Murphy never contacted him about the fact that he was released and was available is not credited. Notwithstanding Murphy's indication of availability, in August 1993 Lucas hired Danny Dalser, who had not worked

[10] It is noted that Lucas testified that there was no panel. It is also noted that when Murphy saw Lucas on May 14, 1993, Lucas did not tell Murphy that his name was removed from a panel because he had been incarcerated. Murphy's testimony about this conversation is credited.

previously for Mining Specialists, Inc., as a roof bolter at the Campbell's Creek Mine of Point Mining, Inc. As noted above, Murphy was a roof bolter. Under these circumstances, the Respondents are liable to Murphy as set forth by the General Counsel.

With respect to Willis, the Respondents, as noted above, argue that he is not entitled to backpay because he did not make a reasonable effort to secure a substantially equivalent position and, if he is entitled to backpay, he is not entitled to it for the 4-month periods (rafting off-season) when he willfully removed himself from the work force. As the Board pointed out in *Black Magic Resources*, 317 NLRB, supra at 721:

> It is well settled that an employer may mitigate its backpay liability by showing that a discriminatee "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 575–576 (5th Cir. 1966). This is an affirmative defense, however, and the burden is on the employer to show the necessary facts. The employer does not meet this burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Aircraft & Helicopter Leasing*, 227 NLRB 644, 646 (1976). Further, the standard to which the employee's efforts are held is one of reasonable diligence, not the highest diligence, and he or she need not exhaust all possible job leads. *Lundy Packing Co.*, 286 NLRB 141, 142 (1987). Finally, in determining whether an individual claimant made a reasonable search, the Board looks to whether the record as a whole establishes that the employee has diligently sought other employment during the entire backpay period. *Saginaw Aggregates*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales*, 195 NLRB 395, 398 (1972). Any uncertainty in the evidence is resolved against the Respondents as the wrongdoers. *NLRB v. Miami Coca Cola Bottling Co.*, supra; *Southern Household Products Co*., 203 NLRB 881 (1973).

Regarding the Respondents' argument that Willis restricted his job search, as noted the burden of proof is on the Respondents to make this showing. Strictly focusing on the results of Willis' efforts is not enough. In other words, the Respondent must do more than cite the fact that this miner ended up driving a truck and doing some mechanical work for a rafting company beginning in 1992. The Respondent did not show that Willis unduly restricted his job search after he was laid off by Mining Specialists, Inc. in April 1991, and because of that approach he ended up doing seasonal work for a rafting company.[11] But Willis testified that after he started with the rafting company he did not look for other work. Was Willis' failure to pursue employment as a coal miner after he started working for the rafting company in essence a willful loss of earnings which would stand between him and his right to backpay? Did the Respondent demonstrate that coal mining positions were available in the area in which Willis lived during the involved period? Before it can be concluded that Willis caused a willful loss of earnings by taking the job with the rafting company and not looking for substantially equivalent employment while he worked for the rafting company, it must be shown that substantially equivalent work was available. The Respondents have the burden of proof. They have not met their burden of proof on this issue. But Willis' testimony that when he was laid off during the rafting off-season he did not look for work is something else. Now we are not dealing with wor, which is substantially equivalent to his coal mining position. It was not reasonable for Willis to neglect to even make reasonable efforts to find interim work during the rafting off-season. Generally, someone who does seasonal work for one type of business should be looking for seasonal work with another type of business, i.e., one who drives a truck for a rafting company when it is warm could be looking for a job driving a heating oil delivery truck when it is cold. To not even make the effort to see what is available, in my opinion, does stand in the way of Willis' right to backpay during December, January, February, and March of, as here pertinent, 1993, 1994, 1995, and 1996. Contrary to the contention of the General Counsel, the willful idle periods were not brief; they were for one third of each of the years involved. With these adjustments, the Respondents are liable to Willis as set forth by the General Counsel.

With respect to the bonus, I agree with the contentions of the General Counsel. The Respondents did not intend to, and they did not, comply with the Agreement in installing and terminating the involved bonus plan. The bonus became an "extra-contractual" term and condition of employment. The bonus was a mandatory subject of bargaining since it was compensation for services rendered and not a gift. This was not a turkey at Christmas. The bonus was not based on the Respondents' financial condition. The bonus was based on production. Originally the bonus was based on the amount of coal the miners produced. Subsequently, the bonus was based on the amount of clean coal the miners produced. Obviously, the more coal the miners produced the greater the likelihood of increasing the amount of clean coal produced. In other words, the bonus was a payment uniform in amount, based on the sweat of the miners and not on the financial ability or benevolence of the Respondents. The bonus was part of the miners' wage package. It was a term and condition of employment.

In *Mining Specialists*, 314 NLRB 268 (1994), the Board ordered the Respondents to bargain with the Union as the exclusive representative of the involved employees concerning rates of pay, wages, hours of work, and other terms and conditions of employment. As pointed out by the Board in *ABF Freight System*, supra, to the extent that a respondent's unlawful failure to apply the terms of the collective-bargaining agreement may have led to improved terms and conditions of employment for unit employees, the Board's Order shall not be construed as requiring or permitting the Respondent to rescind any such improvements unless requested to do so by the union. This has been the Board's approach for quite some time. In *Mego Corp*., 254 NLRB 300 (1981), the Board concluded that it would contravene the purpose of the Act if the involved employees were penalized by an order that on its face would seem

[11] As was demonstrated, it is not necessary to renew certified underground miner papers. The only thing required is 8 hours of retraining every year or when the miner is recalled. Consequently, the lack of an unnecessary renewal indicates nothing.

to require the respondent employer to withdraw certain benefits which have inured to the employees outside the lawful agreement. There the Board used specific language to remedy the situation. Here, the involved bonus was installed after the record was closed in the unfair labor practice phase.[12] So there was no situation to remedy at that time. Nonetheless, this is a longstanding policy. Yet approximately 6 months after the Board issued *Mining Specialists*, supra, the Respondents on January 3, 1995, terminated the bonus citing the Board's July 8, 1994 decision. The Respondents are liable for the bonus pay. As noted, the Respondents stipulated that they owe the amounts set forth in the General Counsel's Exhibit 7 in the event it is concluded the unit employees are entitled to the bonus. It is concluded that the unit employees are entitled to the bonus.

[12] The hearing was held on November 18, 1993, and the bonus plan was installed about April 1994.

SUPPLEMENTAL ORDER[13]

Respondents Mining Specialists, Inc. and Point Mining, Inc., jointly and severally, their officers, agents, successors, and assigns, are ordered to pay the amounts covered by the Board's November 26, 1999 Supplemental Decision and Order herein to the extent that it grants the General Counsel's Motion for Partial Summary Judgment, and the amounts stipulated to by the parties consistent with the conclusions reached above. The Respondents do not have (1) any liability to Anthony DeMarco, or (2) any liability to Afton Willis for December, January, February, and March during 1993, 1994, 1995, and 1996. Interest shall be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Dated, Washington, D.C. February 9, 2001

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.